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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act	)	CC Docket No. 92-90
Of 1991	)	

COMMENTS OF COMCAST CABLE COMMUNICATIONS, INC.

Comcast Cable Communications, Inc. ("Comcast") hereby submits its comments in response to the Federal Communications Commission's (the "FCC's" or the "Commission's") Further Notice of Proposed Rulemaking ("NPRM") relating to the FCC rules implementing the Telephone Consumer Protection Act of 1991 (the "TCPA"). As is discussed below, Comcast fully supports the FCC's efforts to protect consumers from fraudulent and deceptive telemarketing practices. Comcast believes, however, that any changes to the FCC's rules implementing the TCPA (the "Rules") should not unnecessarily interfere with Comcast's ongoing regular communications with its existing customers via the telephone.

Founded in 1963, Comcast has a demonstrated history of leadership in the media and communications industries. As a result of the combination of its cable operations with the cable operations of AT&T Broadband Corp., Comcast is now the largest cable operator in the country, serving approximately 22 million subscribers.

Comcast attributes much of its success to the high-quality customer service it provides, including through telemarketing services used to acquire and foster its relationships with existing and potential customers. Most customers can contact Comcast via telephone and speak with a live customer service representative 24 hours a day, 7 days a week, 365 days a year. The telephone is a simple and effective means of interacting with consumers about the variety of

features and services Comcast offers, as well as the extent to which such service offerings and choices can be best modified to address the needs of individual customers. The ability to interact directly with customers or potential customers via the telephone is particularly important in explaining new service offerings that have become available as a result of Comcast's deployment of broadband services, such as digital video, high definition digital television, video on demand and high speed Internet access.

Given the important role that telemarketing plays in Comcast's customer care operations, Comcast is very concerned that changes to the Rules not interfere with its ability to effectively and conveniently serve its customers. The TCPA authorizes, but does not require, the Commission to create a national do-not-call registry. Although Comcast agrees that a national do-not-call list could help to ensure that consumer privacy interests are respected, Comcast also believes that the implementation by the FCC of a national do-not-call registry, absent certain changes, could have adverse consequences for both consumers and businesses. In particular, Comcast urges the Commission to maintain, in its current form, the "established business relationship" exemption provided under the Commission's rules implementing the TCPA. In addition, Comcast believes that the FCC should consider precisely how any national do-not-call registry adopted by the Commission would operate in relation to the national do-not-call registry currently under consideration by the Federal Trade Commission ("FTC"). Comcast strongly believes that any do-not-call registry created at the national level should be combined in a single database and implemented so as to apply to all businesses without exempting those industries with respect to which the FTC does not have jurisdiction. Ideally, the national do-not-call registry would preempt the requirements of the approximately twenty-seven states that have

adopted individual do-not-call lists, thereby substantially lessening the costs and reducing the complexity of complying with these laws.

I. A National Do-Not-Call Registry Should Reflect the Commission's Current Established Business Relationship Exception.

The NPRM seeks comment on whether the Commission should narrow its definition of an "established business relationship" in implementing a national do-not-call list. Comcast believes that the FCC's formulation of the established business relationship exemption under its current rules accurately reflects the legislative history underlying the TCPA. Moreover, the current rule is appropriately flexible and encompasses the range of customer communications that Congress intended to protect, including communications that are designed to renew customer relationships and to communicate important information about additional products and services.

The TCPA authorized the FCC to create "a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations."[1] Under the statute, the term "telephone solicitation" is defined so as to exclude calls to "any person with whom the caller has an established business relationship."[2] Therefore, when it enacted the TCPA, Congress effectively precluded the FCC from using a national database to prevent telemarketing calls to persons with whom the caller has formed an "established business relationship."[3]

The legislative history underlying the TCPA illustrates that the established business relationship exemption was adopted by Congress in order to strike a balance between "barring all

[1] 47 U.S.C. § 227(c)(3).

[2] *Id.* at §227(a)(3).

[3] *Id.* at § 227(a)(3).

calls to those subscribers who object[] to unsolicited calls" and the legislature's "desire to not *unduly interfere with ongoing* business relationships."[4] To provide as much protection as possible to the former interest, while respecting the latter, Congress "adopted an exception to the general rule – that objecting subscribers should not be called – which enables businesses to continue established business relationships with customers . . . ."[5] In fact, according to the House Report, the established business relationship exemption was intended to enable businesses to place calls that "build upon, follow up, or renew, within a reasonable period of time," customer relationships.[6] The House Committee expressly recognized that "consumers who previously have expressed interest in products or services offered by a telemarketer are unlikely to be surprised by calls from such companies or to consider them intrusive."[7]

The House Report also establishes that the statutory exemption for calls furthering "established business relationships" was expressly designed to cover calls by cable television systems operators to their existing subscribers:

> "Under the exception adopted by the Committee, an established business relationship would include a business entity's existing customers, for which an established business relationship is clearly present. Therefore, magazines, cable television franchises, and newspapers all could call their current subscribers to continue their subscriptions even if such subscribers objected to 'unsolicited' commercial calls. . . . In the Committee's view, an established business relationship also could be based upon any prior transaction, negotiation or inquiry between the called party and the business entity."[8]

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[4] *See* H.R. Rep. No. 102-317, at 13-16 (1991) [hereinafter, *House Report*].

[5] *Id.* at 13 (1991).

[6] *Id.*

[7] *House Report*, H.R. Rep. No. 102-317, at 13.

[8] *Id.* at 14.

Under the FCC's current rules implementing the TCPA, an "established business relationship" is defined as:

> "A prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party."[9]

In adopting this definition, the Commission concluded, based on the legislative history and the comments submitted during its rulemaking proceeding, that "a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests."[10] The current definition is necessarily flexible to encompass the various types of customer communications that Congress intended to protect, and enables cable systems, newspapers and other companies to renew customer relationships and to communicate with existing customers regarding the full range of products and services that they offer.

The NPRM asks whether the Commission should "consider modifying the definition of 'established business relationship' so that a company that has an established relationship with a customer based on one type of product or service may not call consumers on the do-not-call list to advertise a different service or product."[11] Limiting the definition in this manner, however, would be contrary to the statutory language, which broadly exempts all calls to persons "with whom the caller has an established business relationship." Neither the statute nor its legislative history suggest a rationale for limiting calls with existing customers to solicitations with respect

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[9] *47 C.F.R. § 64.1200(f)(4).*

[10] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8770 (1992) ("*First TCPA Order*").

[11] *NPRM*, 67 Fed. Reg. at 62670.

to the product or service that formed the basis of the existing relationship. Rather, the legislative history indicates that Congress specifically had in mind exempting solicitations that offer new or different products or services to a caller's existing customers. The House Report explains that under the established business relationship exception "[a] person who recently bought a piece of merchandise may receive a call from the retailer regarding special offers or information - on related lines of merchandise. [and a] loan officer or financial consultant may call a telephone subscriber who had requested a loan or bought auto insurance a couple of months ago to pitch new loan offerings or other types of insurance."[12]

Moreover, any limit on the types of services that can be marketed under the established business relationship exemption could undermine the Commission's policies aimed at promoting the rapid deployment of new broadband services. Comcast already has made enormous capital expenditures to expand its array of advanced video and data services, including interactive programming guides, high definition digital video services, high-speed cable modem Internet access, pay-per-view and video-on-demand services, multiple channels of digital music, and cable telephony. Targeted telemarketing campaigns timed to coincide with the roll out of system upgrades in particular communities have proven among the most effective and convenient means of informing customers about these new services.

While Comcast supports the Commission's goal of respecting consumer privacy, limiting the definition of an established business relationship could instead restrict consumer choices and interfere with Comcast's ability to conveniently inform customers of new service offerings, thereby hindering widespread adoption of broadband services. Comcast's customers have been extremely receptive to learning about new service offerings, adopting these new, advanced

[12] *House Report*, H.R. Rep. No. 102-317, at 14-15.

services at very high rates. For example, subscriptions to broadband Internet services, which are critical to the continued growth of the Internet economy, have surged in recent years, and the introduction of high definition television services to subscribers is an essential component of advancing the digital transition. The efficient and effective use of telemarketing to inform consumers of the availability and advantages of high-speed Internet access, high definition television and other evolving digital cable services is critical to their future growth. Comcast believes that it would be counterproductive for the Commission to restrict the ability of cable operators to market new broadband services at the same time as the Commission is encouraging industry to invest in their further deployment.

The Commission also seeks comment on whether the established business relationship exemption should be limited so as to apply only in the case of consumers who have made an inquiry within a specified period of time.[13] Comcast believes that the enormous variety of reasons that may lead to a lapse of time between communications with prior or prospective customers is likely to render arbitrary any temporal restriction on the established business relationship exemption. The digital video, Internet access and broadband services markets are rapidly evolving, both in terms of the new services that are becoming available and the various competitors that are providing them. Customer decisions to use or change providers may depend on a wide range of factors, including service availability, product features and pricing and customer satisfaction.

In this highly complex and competitive market, restricting the ability of service providers to contact prospective or previous customers based on an arbitrary time-periods unnecessarily interferes with ability their ability to effectively communicate with customers. Unlike print or

[13] *NPRM*, 67 Fed. Reg. at 62673

telecast promotions, telemarketing allows consumers to interact with Comcast's customer service representatives, who can better explain the features of Comcast's suite of advanced services and tailor choices to meet the needs of individual consumers. Outbound telemarketing has proven critically important to Comcast's successful deployment of digital video and broadband services. The high adoption rates associated with telemarketing of new service offerings indicate that consumers receive tangible benefits when contacted by companies they know and trust. Telemarketing is among the fastest means of informing consumers when new services become available in their neighborhoods. Any limitation of the established business relationship exemption should not restrict the ability of cable operators to contact existing and prospective customers as they roll out new service offerings or expand the reach of their cable franchises.

II. Any National Do-Not-Call Registry Should Impose a Single, Uniform Standard.

In the event the FCC concludes that a national do-not-call list is necessary to protect the privacy of residential telephone subscribers, it should recognize the importance of establishing a single set of uniform rules implementing such a registry. As between the FCC and the FTC, the FCC is far better positioned to implement and enforce a uniform set of regulations governing a national do-not-call registry. In fact, unlike the FTC, the FCC is specifically authorized by the TCPA to "require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations."[14] The FTC has no parallel authority under the Telemarketing Consumer Fraud and Abuse Prevention Act.[15]

The FCC's jurisdiction over businesses that solicit consumers by telephone is not subject to the jurisdictional limitations faced by the FTC. The FTC's proposed national do-not-call rules

[14] 47 U.S.C. § 227(c)(3)

would not, for example, be applicable to banks, credit unions, savings and loan institutions, common carriers or insurance companies, all of which are expressly exempted from coverage under the FTC Act.[16] The FTC's jurisdictional limitations would result in confusion for consumers who believe they have registered with the national do-not-call registry but continue to receive telemarketing calls from members of the various industries that are not subject to the jurisdiction of the FTC. Moreover, under the FTC's limited jurisdiction, cable operators and other businesses would be subject to restrictions that would not be applicable to their direct competitors. In particular, common carriers that provide Internet access, high speed DSL, and video services to residential subscribers would be exempted from the FTC's rules, even though their direct competitors in the cable industry would not be exempted.

In deciding whether and how to implement a national do-not-call registry, the Commission also should consider the constitutional implications associated with outlawing commercial speech between businesses and their existing or potential customers. While a national do-not-call list may, in and of itself, unreasonably interfere with legitimate commercial speech, any such regulatory scheme promulgated by the FTC as opposed to the FCC is less likely to survive constitutional scrutiny. The FTC's proposed do-not-call rules include so many exemptions as to make them unlikely to "directly and materially advance" any governmental interest in protecting privacy.[17] Therefore, if a federal do-not-call registry is adopted, it should be done under the auspices of the TCPA and implemented by rules promulgated by the FCC.

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[15] 15 U.S.C. §§ 6101-6108.

[16] *See FTC Notice*, 67 Fed. Reg. 4492, 4493 (January 30, 2002)

[17] *See, e.g., Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 181 (1999) (holding that "[t]he operation of the [casino gambling statute] and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.")

Moreover, if the Commission ultimately adopts a national telemarketing do-not-call registry, it should in doing so assert its jurisdiction over all interstate telemarketing calls. Consistent with the Communications Act of 1934's general preemptive effect over state regulation of interstate wire communications,[18] Congress unambiguously intended that any federal do-not-call registry implemented pursuant to the TCPA would preempt state do-not-call lists and related procedural requirements. In fact, the House Report accompanying the TCPA notes that "the House Committee [] believes that because state laws will be preempted, the Federal statute must be sufficiently comprehensive and detailed [to] ensure States' interests are advanced and protected."[19] In addition, according to Senator Hollings, who sponsored the TCPA in the Senate, "[p]ursuant to the general preemptive effect of the Communications Act of 1934, *[s]tate regulation of interstate communications, including interstate communications initiated for* telemarketing purposes, is preempted."[20] The legislative history thus evidences Congress' intention that "if the FCC requires establishment of the [national do-not-call] database permitted in subsection c(3), State or local authorities' regulation of telephone solicitations must be based upon the requirements imposed by the FCC."[21]

Approximately twenty-seven states already have established state-administered do-not-call lists that impose varying requirements and costs on telemarketers. These costs include fees charged to access such lists in order to comply with each state's law, updating company telemarketing lists based on the state do-not-call lists on a regular basis so as to comply with specific statutory requirements, and devoting resources necessary to monitor and comply with

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[18] 47 U.S.C. § 152(a).

[19] *House Report*, H.R. Rep. No. 102-317, at 20.

[20] 137 Cong. Rec. S18781 (Nov. 27, 1991).

[21] *House Report*, H.R. Rep. No. 102-317, at 25.

the proliferating set of state telemarketing laws and regulations. In addition, the absence of a uniform means of maintaining and providing access to the state do-not-call lists makes it extremely burdensome for companies to conduct national telemarketing campaigns. In fact, in the absence of federal preemption, a company many need to compare a list of current or prospective customers that it wishes to contact by telephone with a national do-not-call list, its own company maintained do-not-call list and the do-not-call lists of some twenty-seven different states.

The administrative and technological burdens associated with registering with those states' regulatory agencies and suppressing telemarketing lists with each such state's do-not-call list impose unnecessary costs on companies that engage in nation-wide telemarketing campaigns. Adopting a single, uniform standard also would be far more convenient and less confusing for consumers. At a minimum, the FCC should provide telemarketers with the ability to comply with the national do-not-call rules in the case of interstate calls and the state do-not-call laws in the case of purely intrastate telemarketing campaigns. Providing for a uniform set of standards would significantly ease the burdens imposed on legitimate businesses while at the same time simplifying the steps that must be followed by consumers who do not wanted to be contacted by telephone.

III. The Commission's National Do-Not-Call Scheme Should Require Subscribers to Renew Their Do-Not-Call Requests On a Yearly Basis So As To Ensure The Continued Accuracy of The Do-Not-Call Database.

The Commission has requested comments on what options the Commission might pursue to satisfy the requirement in Section 227(c)(3)(I) of the TCPA that the FCC's national do-not-call regulations "specify the frequency with which such database will be updated . . . ."[22]

[22] *See* 47 U.S.C. § 227(c)(3)(I); *NPRM*, 67 Fed. Reg. at 62676

Telephone numbers change for at least sixteen to twenty percent of the population each year,[23] meaning that within five years, almost all of the numbers on a do-not-call list would belong to different subscribers, many of whom may not have elected to be included on such a list. Comcast thus believes that a reasonable period of time for the Commission to retain names and numbers on a national do-not-call list is no longer than twelve months from the date of a consumer's *initial registration, or from any subsequent renewal*. Because automated registry systems are available for maintenance of a do-not-call list,[24] Comcast does not believe that consumers would find annual renewal to be an onerous process. The Commission also should consider implementing authentication mechanisms necessary to ensure that only subscribers of record will be able to place their numbers on any final national do-not-call list. Finally, the Commission should allow telemarketers that reasonably believe that a number included in the national registry has been reassigned to remove that number from their suppression lists.

IV. The Commission Should Provide A "Safe Harbor" Provision in Its National Do-Not-Call Scheme To Shield Sellers and Telemarketers From Liability For Inadvertently Calling A Suppressed Number.

Should the Commission decides that a national do-not-call registry is in the public interest, it should adopt reasonable "safe harbor" protections for telemarketers that make diligent,

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[23] *See* Comments of The Direct Marketing Association and The U.S. Chamber of Commerce in FTC's Telemarketing Sales Rule Rulemaking Proceeding (FTC File No. R411001), at 12 (April 2002), *available at* http://www.ftc.gov/os/comments/dnepapercomments/04/dma.pdf (last visited Nov. 12, 2002); *TCPA Report and Order*, 7 F.C.C.R. 8752, 8759 (1992), *citing* Comments of AT&T in the FCC's Telemarketing Rulemaking Proceeding (CC Docket No. 92-90) (1992).

[24] *See* Caroline E. Mayer, *FTC Anti-Telemarketer List Would Face Heavy Demand*, Washington Post, March 19, 2002, *at* http://www.washingtonpost.com/wp-dyn/articles/A47200-2002Mar18.html ("To collect names, the agency is not planning to rely, as most states have, on operators or the Internet. Consumers who want to sign up would have to call in from the phone number they want listed on the do-not-call registry. The number would be automatically 'captured' in the database, and the consumer would have to verify it by entering the number again. 'That's all we need,' [J. Howard Beales III, director of the FTC's Bureau of Consumer Protection] said.").

good faith efforts to comply with the Commission's rules but inadvertently call a number that appears on the Commission's do-not-call list. A reasonable safe harbor provision would shield telemarketers from liability if they have obtained and reconciled their lists against the names and/or numbers in the Commission's national registry within ninety days of making the call in question. The FTC, in connection with its Telemarketing Sales Rule, noted that "strict liability is inappropriate where a company has made a good faith effort to comply with the [Telemarketing Sales] Rule's requirements and has implemented reasonable procedures to do so."[25] Comcast believes that strict liability is similarly inappropriate under the TCPA.

V. The Commission Should Refrain From Adding Burdensome New Requirements To Its Company-Specific "Do-Not-Call" Rules.

The Commission has requested comment on whether it should consider additional modifications that would allow consumers additional means of registering their numbers on company-specific do-not-call lists, if they are retained under any revisions to the Rules.[26] The Commission suggests requiring telemarketers to provide a toll-free telephone number and/or to establish a web site that consumers could use to place their name and number on a company-specific do-not-call list.[27] It further asks if companies should be required to "respond affirmatively to such requests or otherwise provide some means of confirmation so that consumers may verify that their requests have been processed."[28] Comcast believes such requirements would serve little purpose other than to burden legitimate businesses that faithfully honor consumers do-not-call requests, and would be ineffective in preventing misconduct by those who do not fall into that category.

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[25] *See* 67 Fed. Reg. 4492, 4520 (proposed Jan. 30, 2002) (to be codified at 16 C.F.R. pt. 310).

[26] *NPRM*, 67 Fed. Reg. at 62669.

[27] *Id.*

VI. The Commission Should Refrain From Affirmatively Requiring the Use of Telecommunications Equipment That Supports Caller ID.

The Commission has asked for comment regarding whether telemarketers should "transmit the name and telephone number of the calling party, when possible, or prohibit them from blocking or altering the transmission of such information."[29] Comcast believes any additional restrictions should be limited to prohibiting falsification or deliberate blocking of caller ID information by a telemarketer using equipment capable of transmitting such information. The Commission should not affirmatively require transmission of caller ID information because of the technical limitations associated with transmitting such information through existing systems, as well as the burden associated with replacing such systems. Several of Comcast's telemarketing contractors, for example, use proprietary dialers that are incapable of transmitting such information. Furthermore, Comcast's contractors also use trunk or T-1 lines that are cost-effective but often incapable of transmitting caller ID information, or capable of transmitting only a non-callable trunk exchange number that is useless to consumers and has the potential to cause confusion.

VII. The Commission Should Refrain From Imposing a Predictive Dialer Abandonment Rate That Is Lower Than Three To Five Percent.

The Commission has asked whether it should adopt rules to restrict the use of predictive dialers as well as whether it should set a maximum rate of permissible abandoned calls.[30] Comcast feels strongly that a maximum "abandonment rate" should be no lower than five percent (5%). Requiring predictive dialers to be set at a rate less than five percent would

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[28] *Id.* at 62670.

[29] *NPRM*, 67 Fed. Reg. at 62670.

[30] *Id.* at 62671.

drastically reduce the efficiency of telemarketing call centers. For example, in the event that Comcast is forced to operate its predictive dialers at a maximum acceptable abandonment rate of three percent (3%), average call center productivity would drop to approximately ten (10) contacts per operator per hour. At a maximum one percent abandonment rate, Comcast estimates that its call center productivity would fall to only three (3) or four (4) contacts per operator, per hour. A zero percent (0%) abandonment rate would result in a cost-prohibitive loss of productivity and probably would force Comcast to severely curtail or altogether eliminate outbound calling.

Comcast's estimates are consistent with data compiled by the American Teleservices Association ("ATA"). According to the ATA, ninety-four percent (94%) of all call centers could operate efficiently at a five percent abandonment rate, while only sixty percent (60%) could operate efficiently at a three percent maximum abandoned call setting, and only seven percent (7%) could operate efficiently at a one percent maximum setting.[31] These data support the adoption of a five percent maximum abandonment rate setting as the best means of balancing consumers' interest in avoiding "dead air" calls with the economic interest in promoting call center efficiency.

* * * *

Comcast appreciates the opportunity to submit these comments and hopes that the Commission will strike the appropriate balance between protecting consumers' legitimate privacy interests and addressing the legitimate business concerns of companies that engage in valuable telemarketing.

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[31] *See* California Workshop: Predictive Dialers and Abandoned Calls, November 6, 2002, *available at* http://www.ataconnect.org/htdocs/govtrel/news/2002/nov/capuc.htm (last visited Nov. 12, 2002).

Respectfully submitted

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Federal Communications Commission

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